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HONG TENG YONG

v.

KHAW KIM SENG & ANOR

B

HIGH COURT MALAYA, IPOH
CHOONG SIEW KHIM JC
[CIVIL APPEAL NO: 12-176-2004]
21 MAY 2010

C ***ROAD TRAFFIC:*** *Negligence - Road accident - Liability - Whether appellant's vehicle infringed on wrong side of road causing accident - Admissibility of independent witness's evidence - Whether evidence given credible and irrefutable - Whether Sessions Court correct in finding appellant 100% liable*

D ***DAMAGES:*** *Medical expenses - Expenses at private hospital - Whether first respondent entitled to seek treatment at private hospital - Whether first respondent could incur substantial private medical costs - Whether Sessions Court erred in not awarding full reimbursement of claim*

E This was an appeal from the judgment of the Sessions Court judge who found the appellant (the second defendant) wholly liable for causing the accident between car WQ 787 driven by the second respondent (the first defendant) and motorcycle ACS 4891 ridden by the first respondent (the plaintiff). The appellant was the

F personal representative of Hong Teng Yong, the owner of car ADH 2102. Briefly, the Sessions Judge had come to her finding on liability based on the facts, evidence and circumstances surrounding the case that on 12 March 1998 at 9.30am, the two respondents were travelling along Jalan Ghazali Jawi when the

G driver of car ADH 2102 who was travelling from the opposite direction suddenly encroached on to their right of way thus forcing the second respondent to evasively swerve to his left, causing him to collide with the first respondent. The appellant argued (i) that there was a material contradiction arising from the

H testimony of the respondents that was erroneously considered by the trial judge and (ii) that the witness SD2's evidence was inadmissible hearsay evidence. The first respondent herein cross appealed on the quantum against the award on medical expenses of which only 1/3 was allowed.

I

Held (dismissing appellant's appeal against liability; dismissing first respondent's cross appeal): A

(1) The two respondents had testified that car ADH 2102 had overtaken another car when encroaching their path while SD2 (a witness) said that 'the car was actually drifting to the other side of the road and not overtaking the other car'. This apparent discrepancy should not detract from the stark and indisputable fact that ultimately it was vehicle ADH 2102 that had consequently infringed on the wrong side of the road against the flow of oncoming vehicles that immediately precipitated the accident. There was no doubt that the trial judge was convinced the appellant's car had veered from its right of way. The appellant had failed to rebut or contradict this material fact when the respondents and SD2 were cross examined. (paras 3 & 4) B C D

(2) SD2 had seen how the accident happened with her very own eyes and had relied on her son to take down the car registration number as she was driving. There was no reason to dispute that SD2 was an entirely independent witness who had no interest in the success or failure of the case. The trial judge had heard, seen and observed SD2's demeanour and accepted her evidence as credible. Based on such irrefutable evidence, it was inherently probable that the accident happened according to the version of the respondents. The Sessions Court had judiciously considered and evaluated the entire evidence adduced in its totality before finding the appellant 100% liable and she had not erred in the manner and on the grounds argued by the appellant. (paras 6-9) E F

(3) As to the first respondent's cross appeal, it was confined as to whether the amount of RM19,474.34 or an amount invariably less should be allowed in considering whether the first respondent was entitled to seek treatment at Hospital Fatimah. The first respondent was not entirely entitled to be treated privately when there was no proof in the first place that the same treatment was not available at the Ipoh General Hospital for the particular fracture suffered by the first respondent. There was also no evidence of complications arising from the re-fracture that it had to be treated at Hospital Fatimah and nowhere else. As such he could not incur substantial private medical costs and expect to be fully reimbursed. The Sessions Court judge had not erred in awarding 1/3 of this head of claim. (paras 13 & 16) G H I

A **Case(s) referred to:**
Chai Yee Chong v. Lew Thai [2004] 2 CLJ 321 CA ***(refd)***
Pengarah Institut Penyelidikan Perubatan & Anor v. Inthra Devi S Nadeson & Anor [1987] 2 CLJ 420; [1987] CLJ (Rep) 275 SC ***(refd)***
Tan Kia Bak v. Moot King Meng & Anor (Supreme Court Civil Appeal No. 249 Of 1987) (Unreported) ***(refd)***
B

For the appellant - M Karunananthan; M/s Shamini, Karu & Leong
For the 1st respondent - Harban Singh; M/s Gurdev, Dalgit, Su & Co
For the 2nd respondent - Kiren Kaur; M/s Loh & Assocs

C *Reported by Suhainah Wahiduddin*

JUDGMENT

D **Choong Siew Khim JC:**

[1] This is an appeal from the judgment of Pn Rasidah bt Hj Chik the learned Sessions Court judge who found the appellant (the second defendant) wholly liable for causing the accident between car WQ 787 driven by the second respondent (the first
E defendant) and motorcycle ACS 4891 ridden by the first respondent (the plaintiff). The appellant is the personal representative of Hong Teng Yong, the owner of car ADH 2102. The first respondent has cross-appealed on quantum against the award on medical expenses of which only 1/3 was allowed.
F

[2] The Sessions Court judge clearly came to her finding on liability based on the facts, evidence and circumstances surrounding the case that on 12 March 1998 at about 9.30am when the two respondents were travelling along Jalan Ghazali Jawi
G from the direction of the Sports Complex roundabout (see sketch plan P1), the driver of car ADH 2102 who was travelling from the opposite direction suddenly encroached on to their right of way thus forcing the second respondent to evasively swerve to his left. This action caused him to collide with the first respondent. She
H found the testimony of the two respondents to be the same pertaining to how the accident happened. Their version was corroborated by witness SD2 who was driving behind car ADH 2102, when she witnessed how this car "drifted" over to the opposite lane that resulted in the collision between the two
I respondents.

[3] It was the argument of learned counsel for the appellant that there was a material contradiction arising from the testimony of the respondents that was erroneously considered by the trial judge to be otherwise. The two respondents testified that car ADH 2102 overtook another car when encroaching their path while SD2 said that "the car was actually drifting to the other side of the road and not overtaking the other car". That suggested their testimony was at odds and not sufficiently credible but the trial judge mentioned in her grounds that this was not a material contradiction. In this appeal, I am however inclined to agree with the respondents that this apparent discrepancy should not detract from the stark and indisputable fact that ultimately it was vehicle ADH 2102 that had consequently infringed on the wrong side of the road against the flow of oncoming vehicles that immediately precipitated the accident. There was no doubt that the trial judge was convinced the appellant's car had veered from its right of way.

[4] It ought to be noted from a perusal of the notes of evidence that in this connection the appellant had failed to rebut or contradict this material fact when the respondents and SD2 were cross-examined. It was also not expressly put to them that the appellant's car did not cause or was not involved in the accident at all in the way described by them in court.

[5] SD2 was an eye-witness who was called by the second respondent. The essence of her evidence was that after vehicle ADH 2102 was inexplicably driven on to the other side of the road, she saw the oncoming car of the second respondent swerve to its left on to the grass to avoid it and in the process hit the motorcycle which was also on the left. Since she was driving she told her son to take down the registration number of the encroaching car.

[6] At the scene of the accident she subsequently gave her name, contact number and the car registration number to the second respondent who was invited to contact her if she was required as his witness. There was no evidence to suggest that SD2 was an interested party to the suit. Neither was she known or related to any party. There was hence no sustainable reason for her to concoct a story favourable to the second respondent in particular. The appellant's submission that SD2's evidence was

A inadmissible hearsay evidence on the basis that her son who took down the number was not called, with due respect, does not hold water as SD2 saw how the accident happened with her very own eyes and she merely relied on her son to take down the car registration number, as she was driving. There was no reason to B dispute that SD2 was an entirely independent witness who had no interest in the success or failure of the case. In fact her impartiality was never seriously challenged by the appellant at the trial.

C **[7]** As stated earlier, the appellant inadvertently failed to challenge the second respondent's claim that ADH 2102 was the vehicle directly involved in the accident. Furthermore, the trial judge had heard, seen and observed SD2's demeanour and accepted her evidence as credible without issue that the D registration number ADH 2102 was correctly noted and given to the second respondent who went on to mention it in his police report lodged about an hour after the accident. The evidence also shows that the second respondent was not even specifically challenged that he took evasive action when the oncoming car E encroached his right of way.

[8] Based on such irrefutable evidence, it was inherently probable that the accident happened according to the version of the respondents. That there was no contact between vehicles F ADH 2102 and WQ 787 is irrelevant in the circumstances of the case. Vehicle ADH 2102 had directly caused the accident by encroaching the opposite lane. I only wish to comment that the investigating officer's (SP1) investigation was lackadaisical and the adjuster's evidence (SD3) and his report was based on a biased and preconceived conclusion. G

[9] I find that the Sessions Court judge had judiciously considered and evaluated the entire evidence adduced in its totality before finding the appellant 100% liable and she had not erred in the manner and on the grounds argued by learned H counsel for the appellant. As such, the appeal against liability is dismissed with costs.

[10] Going on to the cross-appeal by the first respondent who was awarded 1/3 of his private medical bill of RM19,474.34, it I was contended that the full amount ought to be allowed for these reasons:

(a) The first respondent was taken directly to Hospital Fatimah by the second respondent. His counsel overlooked to mention that it was at his own request that he wanted to be taken to Hospital Fatimah (see p. 40 of the appeal record). A

(b) He had a reason though for making this choice. Prior to the accident, he was still under the treatment of Dr. Siva of Hospital Fatimah following an accident in April 1997 in Singapore where he had worked before. Coincidentally he was on his way home from Hospital Fatimah that morning when the accident happened. It was submitted thus that it was reasonable to seek treatment from Dr Siva who knew and had his medical history/record. B C

[11] From my reading and understanding of the notes of evidence, it was not totally clear on this point but it would seem to suggest and infer that the medical bill was apparently agreed by all the parties subject to submissions (see pp. 34 and 35 of the appeal record with cross-reference to p. 38 of same). Nothing was touched on whether the amount of RM19,474.34 that was incurred was unreasonable on this premise. No one questioned that this amount was unreasonable or on the high side although as a matter of principle, the amount incurred must be reasonable. That being the case and nevertheless, the appeal must be confined to whether the said amount or an amount invariably less should be allowed in considering whether the first respondent was entitled to seek treatment at Hospital Fatimah. D E F

[12] In *Chai Yee Chong v. Lew Thai* [2004] 2 CLJ 321, Abdul Hamid Mohamad FCJ (as he then was) inimitably ran through the whole gamut of authorities regarding the right to get treatment at a private hospital with one school of thought in favour of allowing full expenses incurred at private hospitals while the other school was not amenable towards allowing the claim at all or where only part of the claim was allowed. As to the second line of thought, the Supreme Court in *Pengarah Institut Penyelidikan Perubatan & Anor v. Inthra Devi S Nadeson & Anor* [1987] 2 CLJ 420; [1987] CLJ (Rep) 275 (SC) did not allow medical expenses at a private hospital because the treatment was available at a government hospital while the same court in *Tan Kia Bak v. Moot King Meng & Anor* (Supreme Court Civil Appeal no. 249 of 1987, unreported) allowed only 1/3 the amount claimed because the plaintiff transferred himself to a private hospital on his own accord. The common trend has since been to follow *Tan Kia Bak* by awarding 1/3. G H I

[13] The majority of those cases involved initial admission to government hospitals before subsequent discharge and admission to private hospitals. Nonetheless it is clear that a claimant is not entitled to medical expenses expended in a private hospital of his choice as a matter of right. If he seeks treatment at a private hospital, he has to prove the following as held in *Chai Yee Chong v. Lew Thai (supra)*:

(a) That the particular treatment required is not available at the government hospital due to the unavailability of necessary equipment or qualified doctors or other sufficient reasons.

(b) Though the treatment is available at a general hospital, it is not available within a reasonable period considering the urgency of the treatment. This may be due to the congestion at the government hospital or for other sufficient reasons.

(c) That the treatment at the government hospital though available is grossly inadequate.

[14] The Sessions Court judge allowed 1/3 of the medical expenses because she held that the appellant did not comply with the three guidelines just stated. The instant case I would say is unique on its own facts as the appellant chose to go to Hospital Fatimah because he was treated there for injuries suffered from an earlier accident almost a year ago. He was on follow-up by Dr Siva at this hospital. Yes, Dr Siva had his medical records but did this alone entitle him to straightaway seek treatment before the same hospital as a matter of right?

[15] This was not a case where the accident victim was first admitted to a government hospital and subsequently got himself discharged for treatment at a private hospital for whatever reason. It would seem to be more convenient and straightforward for the first respondent to seek treatment at Hospital Fatimah due to the fact that he was not completely recovered from the first accident. The first respondent said his recovery was 70% at the time of the second accident (see p. 33 of appeal record). This however did not deter him from riding a motorcycle. He suffered a re-fracture to the intercondyle and supracondyle of the right femur.

[16] On the other hand, it should not be overlooked that the first respondent was absolutely presumptuous or even careless when from the evidence he did not even bother to proffer proof of any of the three pre-conditions and on this score it ought to be held

he was not justified to seek treatment at Hospital Fatimah. Convenience *per se* cannot amount to a ground to justify treatment at a private hospital as a matter of right and choice. Nevertheless based on the peculiarity of the case that he was still under treatment by Dr Siva from the said hospital for the same fracture from which he had apparently not fully recovered, the first respondent could choose to be admitted to Hospital Fatimah instead of the Ipoh General Hospital but in my opinion, this choice is still subject to the caveat against full entitlement of the claim for medical expenses. The difference is that he was not entirely entitled to be treated privately when there was no proof in the first place that the same treatment was not available at the Ipoh General Hospital for the particular fracture suffered by the first respondent. There was also no evidence of complications arising from the re-fracture that it had to be treated at Hospital Fatimah and nowhere else. As such he could not incur substantial private medical costs and expect to be fully reimbursed. I therefore hold that the Sessions Court judge had not erred in awarding 1/3 of this head of claim. The cross-appeal is hence dismissed with costs.